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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 684.

M. C. O'NEIL,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

Brief of Benjamin C. Tipton, specially appointed counsel for defendant in error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 534.

W. C. O'NEAL,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

Brief of Benjamin C. Tunison, specially appointed counsel for defendant in error.

ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT.

On Saturday, the 18th day of October, 1902, ADOLF GREENHUT, Trustee in Bankruptcy of the estate of SCARRITT MORENO, Bankrupt, by appointment of the District Court of the United States for the Northern District of Florida, as

Trustee, instituted a proceeding in chancery in the Circuit Court of Escambia County, Florida, for the purpose of having certain property, alleged to have been purchased by said bankrupt, the title to which was taken in the name of said bankrupt's wife, brought into the said United States District Court as a part of the estate of the said bankrupt for administration as required by law; and for the further purpose of having certain mortgages on certain property decreed and declared null, void and of no effect. By advice of counsel, there was joined as defendant in said proceeding, the American National Bank of Pensacola, which said bank was the assignee of one of the mortgages above referred to. On Monday, October 20, 1902, plaintiff in error, who was President of said American National Bank, solely because and for the reason that said trustee had instituted the said suit against the American National Bank and others, and to interfere with and prevent the said trustee from executing and performing his duties as such trustee of said court, went to the office of said trustee, and without any provocation, with intent to kill and murder said trustee, with a knife, struck at the throat of said trustee and cut him at a point behind the left ear, then across the left cheek, ending at left corner of mouth, and immediately thereafter cut and stabbed said trustee four (4) further times. Thereafter, to-wit, on or about the 7th day of November, 1902, the said trustee caused affidavit setting forth, among other things, the above facts, to be presented to the Honorable District Court of the

United States at Pensacola; thereupon the Honorable Judge of said Court entered a rule directing the plaintiff in error to show cause why he should not be adjudged guilty of contempt of court. Plaintiff in error filed his demurrer to the said affidavit and and rule, which demurrer was overruled. Thereupon plaintiff in error filed his answer, issue was joined, testimony was taken, and the court found the allegations of moving papers proved, adjudicated plaintiff in error in contempt, and sentenced him therefor to sixty (60) days' imprisonment in the Escambia County, Florida, jail.

To review this judgment writ of error was sued out to this Honorable Court, supersedeas granted, and on this writ of error the cause is now here. Motion is now made to dismiss the writ of error.

ARGUMENT.

The only question to be determined on this motion is, Will this court review a judgment of the United States District Court in contempt proceedings on error?

At common law no such review could be had.
Chambers' case, Cro. Car., 168;
Crosby's Case, 3 Wils., 188.

The Federal Courts lay down the rule broadly and stringently, that neither appeal or writ of error lies from adjudications in contempt.
Ex parte Kearney, 7 Wheat., 38 (L. Ed. 5, p. 391);

City of New Orleans vs. N. Y. Mail S. S. Co., 20 Wall., 387 (L. Ed. 22, p. 354);
Ex parte Lange, 18 Wall., 163 (L. Ed. 21, p. 872);
Hayes vs. Fischer, 12 Otto, 121 (L. Ed. 26, p. 95);
Ex parte Rowland, 104 U. S., 604 (L. Ed. 26, p. 861);
Ex parte Fisk, 113 U. S., 713 (L. Ed. 28, p. 1117);
In re Tyler, 149 U. S., 164 (L. Ed. 37, p. 689);
In re Debs, 158 U. S., 573 (L. Ed. 39, p. 1097);
In re Chetwood, 165 U. S., 462 (L. Ed. 41, p. 788);
In re McKenzie, 180 U. S., 536 (L. Ed. 45, p. 657).

In Tinsley vs. Anderson, 171 U. S., 101, etc., (L. Ed. 43, p. 96), this court, in referring to Chetwood's case, supra, wherein the court held that judgments in contempt were not reviewable by writ of error, says, as follows:

"But, that statement was made in regard to such judgments in independent proceedings for contempt in the Circuit Courts of the United States and the reason is as stated in the cases referred to in Hayes vs. Fischer, above cited, that such judgments were considered as judgments in criminal cases, in which this court had no appellate jurisdiction from those courts."

The Act of Congress of March 3, 1891, entitled, "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," 1 Supp. R. S. U. S. (2 Ed.), 901, does not modify or affect the foregoing decisions of this Court.

Before the passage of the act above referred to, this court had no appellate jurisdiction in criminal cases. By Section 5, however, of the said act, the appellate jurisdiction hereof was extended "to cases of conviction of a capital or otherwise infamous crime." But, while judgments in contempt proceedings are considered as judgments in criminal proceedings, the offense is neither capital nor infamous, and being neither capital nor infamous, this court has no appellate jurisdiction in the premises.

It is further provided by Section 5 of the said act, that writ of error may be taken direct from District Courts to this Court, "in any case in which the jurisdiction of the court is in issue. * * "

By jurisdiction is meant authority to hear and determine the cause, and is distinguishable from the *exercise of jurisdiction*. The authority to decide a case at all, and not the decision rendered therein, is what creates the jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction—matters of regularity only, and not of jurisdiction.

New Lamp Chimney Co. vs. Ansonia Brass, etc., 91 U. S., 660 (L. Ed. 23, p. 336, etc.).

The statute referred to confers upon this court appellate jurisdiction when the jurisdiction, and not when the *exercise of jurisdiction*, is in issue. Where the court below has authority to hear and determine, as in the case at bar, its jurisdiction would not be in issue within the meaning of this statute.

Smith vs. McKay, 161 U. S., 355 (L. Ed. 40, p. 731);
The Resolute, 168 U. S., 437 (L. Ed. 42, p. 536);
B. & L. Ass'n vs. Price, 169 U. S., 45 (L. Ed. 42, p. 655);
Sheppard vs. Adams, 168 U. S., 618 (L. Ed. 42, p. 603);
Powers vs. C. & O. R. R. Co., 169 U. S., 92 (L. Ed. 42, p. 674);
World's Col. Ex. vs. U. S., 56 Fed. Rep., 666.

The jurisdiction of the District Court of the United States in and for the Northern District of Florida, not being in issue, the writ of error should be dismissed.

Respectfully submitted,

B C Tunison

BENJAMIN C. TUNISON,

Specially appointed Counsel for Defendant in Error, on Motion to Dismiss Writ of Error.